Supreme Court, U.S.
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No.

In the Supreme Court of the United States

October Term, 1997

David Rendel and Rachel Rendel
Petitioners,

vs.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

I. WHETHER THE STATUTE OF LIMITATIONS ON COLLECTION IS REALLY A BAR TO COLLECTION BY THE IRS. THAT IS, WHETHER A TAXPAYER IS ENTITLED TO REFUND OF AN AMOUNT PAID TO THE IRS AFTER THE STATUTE OF LIMITATIONS ON COLLECTING THE AMOUNT PAID HAS EXPIRED.

II. WHETHER A TAXPAYER'S LIABILITY TO THE UNITED STATES AFTER AN ERRONEOUS REFUND IS A *TAX* LIABILITY?

LIST OF PARTIES

The parties to the instant proceedings are David Rendel and Rachel Rendel, petitioners, and the United States of America, respondent. The parties at the United States District Court for this action were:

Plaintiffs: David Rendel and Rachel Rendel
Respondent: United States of America

There are no other known parties in interest.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners David Rendel and Rachel Rendel pray that a writ of certiorari issue to review the memorandum opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this matter on October 23, 1997. (App. A, *infra*, at 1a).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A, *infra*, at 1a) is not reported, but is printed at 97-2 U.S.T.C. ¶50,901 (9th Cir. 1997) (Unpublished). The Order of the Ninth Circuit denying the Rendels' Petition for rehearing With Suggestion for Rehearing En Banc (App. C, *infra*, at 9a) is not reported.

The opinion of the United States District Court (App. B, *infra*, at 3a) is not reported, but is printed at 97-1 U.S.T.C. ¶50,262 (N.D. Cal. 1996).

JURISDICTION

The Memorandum Disposition of the United States Court of Appeals for the Ninth Circuit (App. A, *infra*, 1a) was filed October 23, 1997. Petitioners filed a timely petition for rehearing with suggestion for hearing *en banc* on November 18, 1997. The Ninth Circuit denied the petition for rehearing and rejected the request for hearing *en banc* by unpublished Order on January 6, 1998. (App. C, *infra*, 9a)

This Court has jurisdiction to review the judgement and opinion of the Court of Appeals pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTES INVOLVED

The pertinent portions of the statutory provisions relevant to resolution of this case are as follows:

INTERNAL REVENUE CODE, 26 U.S.C. § 6211:

SEC. 6211. DEFINITION OF A DEFICIENCY.

(a) IN GENERAL. — For purposes of this title in the case of income, estate, and gift taxes imposed by subtitles A and B and excise taxes imposed by chapters 41, 42, 43, and 44 the term "deficiency" means the amount by which the tax imposed by subtitle A or B, or chapter 41, 42, 43, or 44 exceeds the excess of--

(1) the sum of

(A) the amount shown as the tax by the taxpayer upon his return, if a return was made by the taxpayer and an amount was shown as the tax by the taxpayer thereon, plus

(B) the amounts previously assessed (or collected without assessment) as a deficiency,

over —

(2) the amount of rebates, as defined in subsection (b)(2), made.

(b) RULES FOR APPLICATION OF SUBSECTION (a). — For purposes of this section--

(1) The tax imposed by subtitle A and the tax shown on the return shall both be determined without regard to payment on account of estimated tax, without regard to the credit under section 31, without regard to the credit under section 33, and without regard to any credits resulting from the collection of amounts assessed under section 6851 or 6852 (relating to termination assessments).

(2) The term "rebate" means so much of an abatement, credit, refund, or other payment, as was made on the ground that the tax imposed by subtitle A or B or chapter 41, 42, 43, or 44 was less than the excess of the amount specified in subsection (a)(1) over the rebates previously made.

(3) The computation by the Secretary, pursuant to section 6014, of the tax imposed by chapter 1 shall be considered as having been made by the taxpayer and the tax so computed considered as shown by the taxpayer upon his return.

(4) For purposes of subsection (a) —

(A) any excess of the sum of the credits allowable under sections 32 and 34 over the tax imposed by subtitle A (determined without regard to such credits), and

(B) any excess of the sum of such credits as shown by the taxpayer on his return over the amount shown as the tax by the taxpayer on such return (determined without regard to such credits),

shall be taken into account as negative amounts of tax.

INTERNAL REVENUE CODE, 26 U.S.C. § 6212:

SEC. 6212. NOTICE OF DEFICIENCY.

(a) IN GENERAL. — If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43, or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

* * * * *

INTERNAL REVENUE CODE, 26 U.S.C. § 6212:

SEC. 6401. AMOUNTS TREATED AS OVERPAYMENTS.

(a) ASSESSMENT AND COLLECTION AFTER LIMITATION PERIOD. — The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

INTERNAL REVENUE CODE, 26 U.S.C. § 6532(B):

SEC. 6532. PERIODS OF LIMITATION ON SUITS.

* * * * *

(b) SUITS BY UNITED STATES FOR RECOVERY OF ERRONEOUS REFUNDS. — Recovery of an erroneous refund by suit under section 7405 shall be allowed only if such suit is begun within 2 years after the making of such refund, except that such suit may be brought at any time within 5 years from the making of the refund if it appears

that any part of the refund was induced by fraud or misrepresentation of a material fact.

* * * * *

INTERNAL REVENUE CODE, 26 U.S.C. § 7405:

SEC. 7405. ACTION FOR RECOVERY OF ERRONEOUS REFUNDS.

(a) REFUNDS AFTER LIMITATION PERIOD. — Any portion of a tax imposed by this title, refund of which is erroneously made, within the meaning of section 6514, may be recovered by civil action brought in the name of the United States.

(b) REFUNDS OTHERWISE ERRONEOUS. — Any portion of a tax imposed by this title which has been erroneously refunded (if such refund would not be considered as erroneous under section 6514) may be recovered by civil action brought in the name of the United States.

(c) INTEREST. — For provision relating to interest on erroneous refunds, see section 6602.

(d) PERIODS OF LIMITATION. — For periods of limitations on actions under this section, see section 6532(b) .

INTERNAL REVENUE CODE, 26 U.S.C. § 7422:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) NO SUIT PRIOR TO FILING CLAIM FOR REFUND. — No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, accord-

ing to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(b) PROTEST OR DURESS. — Such suit or proceeding may be maintained whether or not such tax, penalty or sum has been paid under protest or duress.

STATEMENT OF THE CASE

The Rendels timely filed their 1984 Federal Individual Income Tax Return, Form 1040, on April 15, 1985, and paid the amount shown thereon as taxes due, after withholding credits, with the return. During the late 1980's the IRS investigated the Rendels for tax fraud. Ultimately the Rendels pleaded guilty to tax evasion for the year 1984. On October 22, 1991, the Rendels paid the amount of $113,057.00 for the taxable year 1984, which amount represented tax in the amount of $64,604.00, fraud penalty in the amount of $32,302.00 and substantial understatement penalty in the amount of $16,151.00. [1] These amounts were accepted by the IRS as an advance payment of an examination deficiency.

On July 12, 1993, the Internal Revenue Service ("IRS") assessed against the Rendels, for the year 1984, additional tax in the amount of $64,604.00, and penalties in the amount of $48,453.00, representing a fraud penalty of $32,302.00 and a penalty for substantial underpayment of $16,151. On an unknown date the IRS erroneously credited the Rende[illegible] with additional 1984 income tax withholding credits in the amount of $113,057.00, as of April 15, 1985. On July 12, 1993, the IRS applied the $113,057.00

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[1] For reasons more fully discussed below, the Rendels' criminal convictions should have nothing to do with their right to recover the money in issue in this case. Undoubtedly, however, these facts played a significant, *sub silencio* role in the disposition of this case below.

remitted by the Rendels on October 22, 1991 in full payment of the assessments made on July 12, 1993. On that same day, July 12, 1993, the IRS refunded to the Rendels the amount of $127,065.43.

The Rendels did not take any action or make any request for the refund that was issued on July 12, 1993, and such refund was not in any manner caused by the Rendels. The amount refunded on July 12, 1993 represented the amount of $113,057.00 previously paid by the Rendels, together with interest in the amount of $14,008.43.

On a date unknown to the Rendels the IRS reversed the (erroneous) withholding credits, in the amount of $113,057.00 such reversal to be effective as of April 15, 1985. No new assessment of 1984 taxes was made at any time after July 12, 1993.

On June 19, 1995, the IRS mailed to the Rendels a notice, demanding payment of $241,161.69 for the taxable year 1984. On or about July 17, 1995, the Rendels paid the amount of $242,200.00, in full payment of the amount demanded.

The IRS did not file any action against the Rendels for recovery of an erroneous refund pursuant to 26 U.S.C. section 7405.

The Rendels filed a timely Claim for Refund for the sum of $242,200.00 on or about September 5, 1995, with the Internal Revenue Service Center, at Fresno, California. The IRS did not act with respect to the Rendels' Claim for Refund at any time before the Complaint was filed herein.

THE DISTRICT COURT RULING:

On cross-motions for summary judgment the District Court ruled in favor of the IRS. The Court perceived an inconsistency in

the Rendels' position that they overpaid their taxes and that their liability to the government after the erroneous refund was not a tax liability. Reasoning that this was akin to arguing out of both sides of the mouth, the Court held that "Either the liability created by the erroneous refund was a tax liability, and hence the government is entitled to reassess and collect that liability, or the liability is not a tax liability, in which case as a matter of law the plaintiffs are entitled to no refund." (App. B, *infra*, pp. 7a-8a).

NINTH CIRCUIT RULING:

The Ninth Circuit, in a three paragraph Memorandum Disposition held that:

1. The IRS could no longer seek to collect the non-rebate refund erroneously paid to the Rendels through a suit pursuant to I.R.C. § 7405; and

2. The original assessment of their 1984 tax liability was extinguished when the Rendels' check was cashed, they voluntarily returned the refund to which they were not entitled (with interest) to the IRS; but

3. the Rendels were not entitled to recover the disputed funds because they "did not exceed the amount of the Rendels' tax liability. See *Lewis v. Reynolds*, 284 U.S. 281 (1932)."

(Memorandum disposition, *infra*, App. A, p. 1a).

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S RULING CONFLICTS WITH THIS COURT'S PRIOR RULING THAT THE IRS MAY NOT KEEP MONEY IT COLLECTS AFTER THE STATUTE OF LIMITATIONS ON SUCH COLLECTION HAS EXPIRED.

The Rendels' petition for writ of certiorari should be granted because the Ninth Circuit's opinion directly conflicts with this Court's prior ruling that the IRS may not keep money that it has collected after the statute of limitations on collection has expired. *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 1 U.S.T.C. ¶218 (1927).

Before the predecessors to 26 U.S.C. 6532(b) were enacted there was no statute of limitations on the government's right to recover erroneous refunds. See *United States v. Wurts*, 303 U.S. 414, 416 (1938); *Talcott*, 23 F.2d at 901. Congress specifically and purposefully overruled this common law right and imposed a two-year limitations period within which the IRS must sue for recovery or the taxpayer is entitled to keep money to which s/he is otherwise not entitled.

By enacting section 6532(b) and its predecessors, Congress decreed that if the IRS fails to act within the specified two year time period taxpayers may keep erroneous refunds, even though they are not otherwise entitled to that money. Under the Ninth Circuit's interpretation of *Lewis v. Reynolds*, 284 U.S. 281 (1932) it is *impossible* for any taxpayer from whom the IRS has managed to collect an erroneous refund, by whatever means, ever to keep that money. It is up to Congress, not the Ninth Circuit, to change that rule.

The present statutory scheme requires the IRS to sue to recover an erroneous refund within two years after the refund was made. 26 U.S.C. sections 6532(b), 7405. [2] The Ninth Circuit correctly held that the IRS could not seek to collect the nonrebate erroneous refund by suit because this limitation period had expired. Notwithstanding, the Court denied a refund, citing *Lewis v. Reynolds*, 284 U.S. 281 (1932), reasoning that the amount paid was not greater than the Rendels' "tax liability."

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[2] The government may also recover erroneous refunds by making a new assessment, if it may legally do so. *Brookhurst, Inc. v. United States*, 931 F.2d 554, 556, 91-1 U.S.T.C. ¶50,217 (9th Cir. 1991); *Warner v. Commissioner*, 526 F.2d 1, 2 (9th Cir. 1975). In the present case, however, a new assessment could not be made.

First, by relying on *Lewis v. Reynolds* instead of *Brookhurst,* the Court manifested its continued agreement with *Kelley*, that after payment a tax cannot be reassessed where the original assessment is neither incomplete nor imperfect. In *Brookhurst*, a new assessment was permissible because the correct amount of tax had never been assessed. The taxpayer had deposited the correct amount of its tax and reported that correct amount on its return, but the IRS mistakenly assessed only a small portion of that amount and refunded the excess to the taxpayer. The "new assessment" was merely a first assessment of the correct balance due.

Here, however, the IRS could not have made a new assessment because the original *and correct* assessment had been extinguished by payment so there was no unpaid tax to "reassess," nor was there any deficiency, within the meaning of 26 U.S.C. section 6212.

Second, although the Rendels' 1984 return was fraudulent, and therefore the statute of limitations on assessment never expired, 26 U.S.C. section 6501(c)(1), there must still be a "tax" to assess, and the cases discussed, *infra*, establish no tax is owed after a nonrebate erroneous refund.

Lewis v. Reynolds requires a taxpayer to establish s/he has overpaid tax in order to obtain a refund. The Ninth Circuit did not consider that the term "overpayment" specifically includes any amount paid after the statute of limitations on collection has expired. 26 U.S.C. section 6401(a). The disputed funds in this case were paid *after* the section 6532(b) statute of limitations on the government's right to sue for collection of the erroneous refund had expired. If the United States is entitled to keep money it manages to collect *after* the statute of limitations has expired, the statute of limitations becomes meaningless.

In *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, the government made the same argument it makes here — that even though it could not sue to collect, it could nevertheless keep amounts collected by other means after the statute of limitations expired. [3] This Court soundly rejected that argument:

> The purpose of the enactment was to fix a time beyond which steps to enforce collection might not

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[3] The only distinction between the instant case and *Bowers* is that *Bowers* involved money seized by the IRS — *i.e.*, involuntary collection. The Ninth Circuit suggested it might have ruled differently if the Rendels had not voluntarily paid the disputed funds. Whether payment is voluntary or involuntary has no bearing on the government's right to retain money it has collected. See 26 U.S.C. section 7422(b) ("* * * suit [for refund] * * * may be maintained whether or not such tax, penalty or sum has been paid under protest or duress."). Thus, "pay first — litigate later" is the procedure required by the statutory scheme. It has never been suggested that voluntary payment to facilitate litigation of a tax dispute disqualifies the taxpayer from obtaining a refund. The voluntary/involuntary distinction is unrelated to whether the taxpayer has overpaid his tax. That distinction has no support either in the Ninth Circuit's rationale, in the statute or in logic

> be initiated. The repose intended would not be attained if suits only were barred, leaving the collector free at any time to proceed by distraint. In fact, distraint is much more frequently resorted to than is suit for the collection of taxes. The mischiefs to be remedied by setting a time limit against distraint are the same as those eliminated by bar against suit. Under [the government's] construction taxpayers having no property within reach of the collector would be protected against stale demands, while others would be liable to have their property distrained and sold to pay like claims. The result tends strongly to discredit [the governments's] contention.

273 U.S. at 349; See also *Toxaway Mills v. United States*, 1927 CCH 7198 (Ct. Cls. 1927). [4]

Moreover, although the Ninth Circuit's opinion does not address any other statute of limitations, its rationale is equally applicable to 26 U.S.C. section 6502, the statute of limitations on collection of taxes. By definition, when the statute of limitations on collection expires the taxpayer escapes paying the tax s/he properly owed. Under the Ninth Circuit's reasoning, if the IRS later manages to collect this amount from the taxpayer the IRS may keep the money because it is less than the taxpayer's tax liability, *i.e.*, the amount the taxpayer owed *before* the statute expired. This defies the statute of limitations as well as this Court's prior decision in *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346.

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[4] Interestingly, in *Toxaway Mills*, the Court of Claims initially ruled against the taxpayer, but, on the taxpayer's petition for a writ of certiorari the United States confessed error and the case was reversed. 273 U.S. 781, 47 S. Ct. 471.

It has been said that hard cases make bad law. See *Winterbottom v. Wright*, 10 M. & W. 109, 116, 152 Eng. Rep. 402, 406 (1842). Mr. Justice Holmes eloquently explained the reason:

> Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U. S. 197, 400, 24 S.Ct. 436, 468 (1904) (Holmes, J., dissenting).

The present case is hard because of the taint of the Rendels' prior criminal convictions for tax evasion. While the equitable pressures of this fact are almost palpable, the applicable legal principles require that the disputed funds be returned to the Rendels. To paraphrase Justice Holmes, the hydraulic pressure of the Rendels' tax fraud has rent asunder the well settled and statutorily embodied principle that two years after an erroneous refund a taxpayer is legally entitled to keep the windfall. This pressure appealed to the feelings and distorted the judgment of the Ninth Circuit, which succumbed to the pressure and issued a ruling that cannot be harmonized either with prior decisions of this Court or with the Internal Revenue Code.

The Rendels' petition for writ of certiorari should be granted because the Ninth Circuit's ruling conflicts with *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346 and with section 6532(b).

II. THE PETITION SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT'S RULING — THAT AFTER THE ERRONEOUS REFUND THE RENDELS OWED A *"TAX LIABILITY"* — CONFLICTS WITH DECISIONS IN FOUR CIRCUIT COURTS OF APPEALS AS WELL AS PRIOR NINTH CIRCUIT DECISIONS.

The petition should be granted because the Ninth Circuit's ruling conflicts with decisions in four other Circuit Court's of Appeals as well as prior Ninth Circuit decisions. The Ninth Circuit held that "The IRS may keep the money, because it did not exceed the amount of the Rendels' ***tax liability***." (Emphasis added). Four Circuit Courts of Appeals, as well as the Ninth Circuit itself, have held that an erroneous refund is not part of the taxpaying transaction and, however a taxpayer's liability to the United States after an erroneous refund is characterized, *it is not a tax liability*. *Bilzerian v. United States*, 86 F.3d 1067, 1069, 96-2 U.S.T.C. ¶50,356 (11th Cir. 1996) ("once a tax liability is paid, no erroneous refund — whether rebate or non-rebate — can revive it"); *O'Bryant v. United States*, 49 F.3d 340, 346-47, 95-1 U.S.T.C. ¶50,143 (7th Cir. 1995) (after a non-rebate erroneous refund "[t]he money the O'Bryants have now is not the money that the IRS' original assessment contemplated, since that amount was already paid. Rather, it is a payment the IRS accidentally sent them. They owe it to the government because they have been unjustly enriched by it, not because they have not paid their taxes"); *Clark v. United States*, 63 F.3d 83, 87, 95-1 U.S.T.C. ¶50,469 (1st Cir. 1995) ("when a taxpayer tenders payment on a tax assessment, that payment extinguishes the assessment to the extent of the payment"; "an erroneous refund does not revive an extinguished assessment" and "there is a fundamental difference between money taxpayers possess as the result of an erroneous refund and money they originally owed the IRS (their tax liability)"); *United States v. Wilkes*, 946 F.2d 1143, 1152, 91-2 U.S.T.C. ¶50,565 (5th Cir. 1991) ("as a taxpayer makes payment against a tax assessment, the

assessment is extinguished in the amount paid and cannot be revived by the IRS's giving the taxpayer an unsolicited, erroneous refund"). [5]

Talcott v. United States, 23 F.2d 897, 1 U.S.T.C. ¶279 (9th Cir. 1928), cert. denied 277 U.S. 604, is the first case in which the Ninth Circuit held that no tax is owed after an erroneous refund. The Court there stated an action to recover an erroneous refund "is not a proceeding for the collection of taxes". *Id* at 901. In *Kelley v. United States*, 30 F.2d 193, 1 U.S.T.C. ¶357 (9th Cir. 1929) the Court reiterated that "When once paid, a tax is gone, and a refund of the money does not restore it." *Ibid*. In *Brookhurst*, 931 F.2d at 556, the Ninth Circuit again agreed with this proposition, citing *Kelley*, but distinguished it on the basis that in *Kelley* the tax could not be reassessed because the original assessment was not imperfect or incomplete. [6] Finally, in *Buffalow v. United States*, 109 F.3d 570, 574, 97-1 U.S.T.C. ¶50,290 (9th Cir. 1997), the Court again noted its concurrence that payment extinguishes an assessment, citing *Clark, O'Bryant, Wilkes* and other cases.

Because no tax is owed after an erroneous refund the Ninth Circuit has misapplied *Lewis v. Reynolds*. That case stands for the proposition that to obtain a tax refund a taxpayer must first establish an "overpayment" has been made, and permits inquiry

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[5] See also *Rodriguez v. United States*, 629 F. Supp. 333, 344-45, 86-1 U.S.T.C. ¶9289 (N.D. Ill. 1986) ("a refund is not, properly speaking, a tax amount"); *Marshall v. United States*, 158 F. Supp. 793, 799, 58-1 U.S.T.C. ¶9479 (E.D. Tex. 1958) (Judgments obtained in § 7405 action are not for "taxes", and cannot support a tax lien).

[6] Of course, in the present case the original assessment was neither imperfect nor incomplete, and for that reason could not be reassessed.

into the correct tax, determined without regard to any statute of limitations. Thus, in *Lewis v. Reynolds* the IRS was permitted to take into account a barred deficiency in determining whether the taxpayer had made an overpayment. The point of *Lewis v. Reynolds* is that the overpayment determination measures the amount paid against the correct tax liability. That analysis has no application in this case, however, because the Rendels' correct tax liability is not an issue. There is no dispute that the assessment was for the correct amount of their 1984 liability and that the Rendels paid that amount, in full. As discussed, *supra*, when the Rendels fully paid their tax the assessment was extinguished and the nonrebate erroneous refund did not revive it (*i.e.*, an erroneous refund does not result in a tax liability). Because no "***tax***" was owed *Lewis v. Reynolds* does not apply.

The character of the Rendels' liability to the government was fixed when the IRS mistakenly paid them the money. For the reasons discussed above, the Rendels' liability to the government was not a tax liability. The Ninth Circuit recognized this in holding that upon payment the original assessment was extinguished. As of that moment they did not owe the IRS a penny; their (correct) "tax liability" was paid in full. Their tax account stood in balance at $zero. Subsequent payment, whether voluntary or involuntary, simply cannot change the character of a liability that came into being more than two years before the payment.

When the IRS accidently refunded the disputed funds to the Rendels, *the previously extinguished assessment was not revived*, and neither their "tax liability" nor their $zero tax account balance changed. Therefore, the predicate for the Ninth Circuit's holding — that the amount paid did not "exceed the amount of the Rendels' 1984 tax liability" — is factually and legally erroneous. Their tax liability and their account balance was zero, but they paid $116,000. That was an overpayment.

The Rendels' petition for writ of certiorari should be granted to resolve the conflict among the Circuit Courts of Appeals as well as within the Ninth Circuit itself concerning whether an erroneous refund results in a tax liability.

CONCLUSION

This case presents a question of exceptional importance — whether the statute of limitations is an *effective* bar against IRS collection. If the Ninth Circuit's opinion is allowed to stand the IRS will be able to keep whatever amount it is able to collect from a taxpayer even though the statute of limitations expired. This result defies Congress' intention to impose a specific time limit within which the IRS must collect erroneous refunds and is patently inconsistent with 26 U.S.C. section 6532(b), yet that is what the Ninth Circuit has given the IRS.

Moreover, the rationale of the Ninth Circuit's opinion applies equally to the general statute of limitations on collection of all taxes. Section 6502. If the opinion is allowed to stand section 6502 will be obliterated, because no taxpayer could ever establish an overpayment if the IRS manages to collect after the statute has expired.

By granting the Rendels' petition for certiorari, however, this Court can correct the Ninth Circuit's decision, which conflicts with this Court's holding in *Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, as well as a clear and unambiguous statute of limitations prohibiting collection after the statute of limitations expires. By granting the petition this Court can also prevent a pernicious erosion of other statutory provisions affected by the Ninth Circuit's rationale.

Finally, by granting the petition for certiorari this Court can resolve the conflict between the Ninth Circuit's decision and prior

decisions of the Ninth Circuit and the four other Circuit Courts of Appeals holding that an erroneous refund does not result in a ***tax*** liability.

Accordingly, the Rendels respectfully request that their petition for writ of certiorari be granted.

Respectfully Submitted,

David M. Kirsch
Counsel for Petitioners

Dated: April ___, 1998

(Appendices follow)

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID RENDEL; RACHEL RENDEL, Plaintiffs - Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 97-15171 D.C. No. CV-96-01120-DLJ M E M O R A N D U M*

Appeal from the United States United States District Court
for the Northern District of California
D. Lowell Jensen, District Judge, Presiding

Argued by Telephone and Submitted October 1, 1997
San Francisco, California

Before: FLETCHER, WIGGINS, and RYMER, Circuit Judges.

David and Rachel Rendel appeal the summary judgment entered in favor of the IRS in their tax refund suit. We affirm.

Even though the IRS could no longer seek to collect the nonrebate refund erroneously paid to the Rendels through a suit pursuant to I.R.C. § 7405, and the original assessment of their 1984 tax liability was extinguished when the Rendels' check was cashed, they voluntarily returned the refund to which they were not

entitled (with interest) to the IRS. The IRS may properly keep that money, because it did not exceed the amount of the Rendels' tax liability. *See Lewis v. Reynolds* 284 U.S. 281 (1932).

We have carefully considered each of the cases upon which the Rendels rely, but none involves a voluntary payment by the taxpayer that equals the tax liability.

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

APPENDIX B

[Opinion of the District Court]

DAVID RENDEL; RACHEL RENDEL, Plaintiffs - Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.	D.C. No. CV-96-01120-DLJ M E M O R A N D U M*

On November 20, 1996, the Court heard arguments on the parties' cross motions for summary judgment. David M. Kirsch appeared on behalf of the plaintiffs, Assistant United States Attorney David L. Denier appeared on behalf of the United States. Having considered the arguments of counsel, the papers submitted, the applicable law, and the record in this case, the Court hereby DENIES plaintiffs' motion for summary judgment and GRANTS defendant's motion for summary judgment.

I. BACKGROUND

A. Factual Background and Procedural History

The facts of this case are basically undisputed. Plaintiffs filed their 1984 joint U.S. Individual Income Tax Return, Form 1040 on April 15, 1985. On April 10, 1991 plaintiffs were indicted for conspiring to defraud the United States and evading income tax. Both pled guilty. As part of the plea agreement plaintiffs tendered a check to the government on October 18, 1991 as an advance

payment of the plaintiffs' 1984 tax liabilities which had yet to be assessed.

On July 12, 1993 the government determined the tax liability of the plaintiffs for 1984 and assessed an additional tax in the amount of $64,604.00 for that year and penalties for the unpaid tax in the amount of $48,453.00 for a total of $113,057.00. On that date, this amount was credited as already paid from the plaintiffs' October 18, 1996 payment. On that same day, the IRS erroneously credited the plaintiffs with an additional 1984 income tax withholding credit in the amount of $113,057.00. As a result, the IRS issued a refund check to the plaintiffs on July 12, 1993, in the amount of $127,065.43. This sum represented the amount of $113,057.00 previously paid by the Rendels plus interest from October 22, 1991 in the amount of $14,008.43.

On April 17, 1995 the IRS discovered the mistaken payment to the plaintiffs. That same day the IRS mailed a notice to plaintiffs with respect their 1984 tax liability. [1] On June 19, 1995, the IRS mailed a second notice to the plaintiffs, informing them that they owed $241,161.69. This sum represents the amount of the 1984 tax penalty due as well as the erroneous refund plus interest. On July 17, 1995, two years and five days after they received the erroneous refund, the plaintiffs mailed two checks to the IRS totaling $242,200.00.

On September 5, 1995 the plaintiffs filed a timely request with the IRS for the return of the $242,200.00. The IRS did not respond, and this complaint was filed.

B. Legal Standard

The Federal Rules of Civil Procedure provide for summary adjudication when "the pleadings, depositions, answers to interrog-

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[1] This first notice was mentioned neither in the complaint nor in the answer. It appears for the first time in defendant's opposition and cross-motion for summary judgment. Plaintiffs do not contest the existence of this notice

atories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e).

In a motion for summary judgment, "[i]f the party moving for summary judgment meets its initial burden of identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine issues of material fact," the burden of production then shifts so that "the nonmoving party must set forth, by affidavit or as otherwise provided in Rule 56, 'specific facts showing that there is a genuine issue for trial.'" T.W. Elec. Service, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987) (citing Celotex Corp. v. Catrett, 477 U.S. 317 (1986)); Kaiser Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986).

A moving party who will not have the burden of proof at trial need only point to the insufficiency of the other side's evidence, thereby shifting to the nonmoving party the burden of raising genuine issues of fact by substantial evidence. T.W. Electric, 809 F.2d at 630 citing Celotex, 477 U.S. at 323; Kaiser Cement, 793 F.2d at 1103-04.

In judging evidence at the summary judgment stage, the Court does not make credibility determinations or weigh conflicting evidence, and draws all inferences in the light most favorable to the nonmoving party. T.W. Electric, 809 F.2d at 630-31 (citing Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp, 475 U.S. 574 (1986)); Ting v. United States, 927 F.2d 1504, 1509 (9th Cir. 1991).

The evidence the parties present must be admissible. Fed. R. Civ. P. 56(e). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. See Falls Riverway Realty, Inc. v. Niagara Falls, 754 F.2d 49 (2nd Cir. 1985); Thornhill Pub. Co., Inc. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Hearsay statements found in affidavits are inadmissible. See, e.g., Fong v. American Airlines, Inc., 626 F.2d 759, 762-63 (9th Cir. 1980).

The party who will have the burden of proof must persuade the Court that it will have sufficient admissible evidence to justify going to trial. The standard for judging a motion for summary judgment is the same standard used to judge a motion for a directed verdict: "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52 (1986). Where as here, the parties do not dispute any of the relevant facts, cross-motions for summary judgment require the Court to determine which party is entitled to judgment as a matter of law.

II. DISCUSSION

Plaintiffs' theory of the case is that the Rendels' October 18, 1991 pre-payment of their taxes due in 1984 extinguished the actual assessment of those taxes on July 12, 1993 when payment was credited and that the subsequent erroneous refund of the payment did not revive that assessment. This is arguably the rule adopted by the courts of appeal, including the Ninth Circuit, which have considered the matter. See, e.g., Kelley v. United States, 30 F.2d 193 (9th Cir. 1929) ("When once paid, a tax is gone and a refund of the money does not restore it."); Bilzerian v. United States, 86 F.3d 1067 (11th Cir. 1996); Clark v. United States, 63 F.3d 83 (1st Cir. 1995); O'Bryant v. United States, 49 F.3d 340 (7th Cir. 1995). Thus, plaintiffs argue, once credited their payment to the government extinguished their tax liability and the liability created by the erroneous refund was not a tax liability at all. See, e.g., O'Bryant, 49 F.3d at 346 ("Because it is a refund, the money the OíBryants received is not part of the taxpaying transaction.").

Plaintiffs further argue that because the tax deficiency for the 1984 tax year was paid in full by the check delivered by plaintiffs on October 18, 1991 the government cannot now reassess plaintiffsí taxes for that year under 28 U.S.C. §§ 6203, 6211-6213. Plaintiffs argue that because they received a non-rebate refund there is no tax deficiency for 1984 and thus the government cannot use

the deficiency proceedings set forth in 6211-6213 to reassess their taxes. Furthermore, the plaintiffs argue that because the government did not sue under 26 U.S.C. § 7405 before the expiration of the two-year statutory period, the government cannot utilize that collection option either. [2] Thus, plaintiffs argue the government was not entitled to collect the erroneous refund and plaintiffs are now entitled to a return of that refund.

In response to this argument, the government relies on the Supreme Court case of Lewis v. Reynolds, 284 U.S. 281 (1937) for the proposition that a taxpayer cannot succeed in a request for a refund unless the taxpayer can show that he has overpaid his taxes. This case places the plaintiffs in a bind from which they cannot escape.

On the one hand, plaintiffs bring this suit on the premise that they seek to collect overpaid taxes. See, e.g., Complaint at ¶ 24. (Plaintiffs have overpaid their tax and additions to tax for the taxable year 1984...."). They claim that they paid the government's request for the $241,161.69 but that because the government was not entitled to collect that tax at the time it was collected, there has been an overpayment of tax. On the other hand, plaintiffs claim that the liability created by the erroneous refund was not a tax liability at all. See, e.g., Opposition and Reply at 2: 16-17 ("[A] taxpayer's liability to the United States after an erroneous refund is not a tax..."). Plaintiffs must maintain the argument that the refund is wholly independent of their tax liability, for if they do not the issuance of the refund would have created an unpaid tax liability, and the government would be permitted to reassess plaintiffs' taxes and enter a deficiency against them. [3]

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[2] There seems to be no disagreement on this point.

[3] The ordinary two-year statute of limitations for reassessment of a deficiency is not applicable in this context because the plaintiffs committed tax fraud and therefore, under 26 U.S.C. § 6501(c)(1) the government may reassess plaintiffs taxes at any time."

The plaintiffs cannot be permitted to argue out of both sides of their mouths. Either the liability created by the erroneous refund was a tax liability, and hence the government is entitled to reassess and collect that liability, or the liability is not a tax liability, in which case as a matter of law the plaintiffs are entitled to no refund. Thus, the Court hereby GRANTS summary judgment to the defendant on the ground that, under the plaintiffs' own argument, they did not overpay their taxes and are hence not entitled to a refund. For the same reason, plaintiffs' motion for summary judgment is DENIED.

III. CONCLUSION

For the reasons set forth above, the Court hereby GRANTS defendant's motion for summary judgment and DENIES plaintiffs' motion for summary judgment.

IT IS SO ORDERED.

Dated: December 3, 1996

/s/ D. Lowell Jensen
D. Lowell Jensen
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID RENDEL; RACHEL RENDEL, Plaintiffs - Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.	No. 97-15171 D.C. No. CV-96-01120-DLJ ORDER

Before: FLETCHER, WIGGINS, and RYMER, Circuit Judges.

The panel has voted to deny the petition for rehearing. Judges Fletcher and Rymer vote to reject the suggestion for rehearing en banc and Judge Wiggins so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.